LIBRARY
SUPREME COURT, U. S.

No. 595

Office-Supreme Court, U.S.
FILED
OCT 1 1968
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1968

EARL R. HINGER,

Petitioner,

vs.

CITY OF PIQUA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO STATE COURT

WILLIAM H. THORNBURGH
Faust, Harrelson & Thornburgh
Attorneys at Law
12 S. Cherry St.
Troy, Ohio
Attorney for Petitioner

RICHARD K. WILSON
Law Director, City of Piqua
City Building
Piqua, Ohio
Attorney for Respondent

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

TABLE OF CONTENTS

	Page
Opinions of the Courts Below	1
Statement of the Grounds on which the Jurisdiction of this Court is Invoked	2
Questions Presented for Review	2
Constitutional Provisions which this Case Involves	3
Statement of the Case	3
Stage of the Proceedings when Federal Question Raised	5
Argument Amplifying Reasons Relied on for Allowance of the Writ	8
Appendix I Opinion of Court of Appeals	21
Appendix II Opinion of Supreme Court	27

INDEX OF AUTHORITIES

1. Constitutional Citations

Constitution of U.S., Amendment V 3
Constitution of U.S., Amendment VI 3
Constitution of U.S., Amendment XIV 3

2. Table of Cases

Columbus v. Hayes, 9 Ohio App. 2d 38 .....4, 16
Miranda v. Arizona, 384 U.S. 436 .....2, 7, 16
Piqua v. Hinger, 13 Ohio App. 2d 108 .....1, 16
Schmerber v. California, 384 U.S. 757 .....3, 4, 18

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ———

EARL R. HINGER,

Petitioner,

vs.

CITY OF PIQUA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO STATE COURT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Earl R. Hinger for a writ of certiorari to review a judgment of the Supreme Court of Ohio made and entered by such court on July 3, 1968, a copy of which, together with a copy of the opinion of the intermediate reviewing court, the Court of Appeals of Miami County, Ohio, are hereto appended, respectfully shows to this honorable court the following:

A. OPINIONS OF THE COURTS BELOW

1. No opinion was rendered by the trial court.

2. A copy of the opinion of the Court of Appeals for Miami County in *City of Piqua* v. *Hinger*, 13 Ohio App. 2d 108, is annexed to this petition as Appendix I.

3. A copy of the opinion of the Supreme Court of Ohio in *City of Piqua* v. *Hinger,* 15 Ohio St. 2d 110, is annexed to this petition as Appendix II.

B. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed, and the time of its entry, is July 3, 1968.

2. There was no request, and hence no order, for either a rehearing or an extension of time within which to petition for certiorari.

3. The statutory provision believed to confer jurisdiction upon this court to review the judgment of the court below by writ of certiorari is United States Code, Title 28, Section 1257 (3), and Rules of The Supreme Court of the United States, No. 19 (1) (a), to wit, the deciding by the state court of a federal question of substance probably not in accord with the applicable decisions of this Court.

C. QUESTIONS PRESENTED FOR REVIEW

1. Do the *Miranda* rights, as enunciated by the Supreme Court of the United States in *Miranda* v. *Arizona,* 384 U.S. 436, extend to an accused during a custodial interrogation after he has been charged with committing a misdemeanor, specifically, the offense of driving while intoxicated?

2. Following an arrest, are the oral answers to questions from a police officer, the performance of tests such as signing your name, picking up coins, walking a line, touching your nose, having these events filmed by a movie camera, and the taking of a Breathalyzer test, "testimonial"

in character, or "physical evidence", as defined and delineated by the Supreme Court of the United States in *Schmerber* v. *California*, 384, U.S. 757?

D. CONSTITUTIONAL PROVISIONS WHICH THIS CASE INVOLVES.

1. Constitution of the United States, Amendment V, reading in part as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

2. Constitution of the United States, Amendment VI, reading in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

3. Constitution of the United States, Amendment XIV, reading in part as follows:

> ". . . Nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

E. STATEMENT OF THE CASE

The petitioner was arrested on the night of February 1, 1967, by police officers of the respondent city, while driving his automobile on the city streets. On the scene he was advised that the charge was driving while intoxicated (DWI), and that he would have to leave his car and go into the police station because he was under arrest for DWI.

At the police station, and before being advised of any

of his legal rights, the officers put him through a series of tests, which included walking a line, picking up coins from the floor, touching the nose with eyes closed and bending backward from an erect position with the eyes closed. During these tests the officers filmed the performance with a movie camera. He was then asked a series of questions designed to test his orientation, the answers were recorded on a sheet, and at their request he signed his name thereto. Next he was given a Breathalyzer test (blowing his breath into a machine), which test he was first advised he did not have to take. He then was booked into jail, at which time the desk sergeant advised him he could use the telephone to call an attorney.

Throughout the trial the petitioner's counsel objected to all evidence arising after the arrest, on the basis of denial of constitutional safeguards, as enunciated in *Miranda*. These objections were overruled on the basis of an Ohio Court of Appeals decision, *Columbus* v. *Hayes*, 9 Ohio App. 2d 38, which held that *Miranda* does not apply to misdemeanors. The petitioner was convicted and sentenced, and thereupon appealed.

The Court of Appeals for Miami County reversed the conviction, holding first that Breathalyzer results cannot be used unless there is evidence explaining to the jury how the machine functions and the significance of the readings; and, secondly, that the principles established by this court in *Miranda* do apply in DWI cases. At the request of respondent, this Court of Appeals certified the case to the Supreme Court of Ohio because of the conflict with the decision of another Court of Appeals.

The Supreme Court of Ohio avoided the issue of the conflict, to wit, whether *Miranda* applies to misdemeanors such as DWI, and instead reversed the Court of Appeals for Miami County and upheld petitioner's conviction on the theory that the aforementioned custodial events con-

stituted real or physical evidence, as distinguished from communication or testimony. The court held it to be unprotected from the constitution, under authority of *Schmerber* v. *California*, 384 U.S. 757, and hence did not find *Miranda* in issue.

F. STAGE OF PROCEEDINGS WHEN FEDERAL QUESTION RAISED.

The federal question was first raised in the trial court, the Piqua Municipal Court, in the form of a motion to suppress all evidence gathered after the arrest and before the accused was advised of his constitutional rights. Upon the completion of the cross-examination of the first police officer called, when for the first time it was disclosed the absence of *Miranda* safeguards, there was a motion to suppress, to instruct the jury to disregard the testimony, and to have a continuing objection as to future witnesses, on the strength of *Miranda*, self-incrimination, right to counsel, and due process, as evidenced by the trial record, as follows:

EXCERPTS FROM THE RECORD OF THE MOTION AND ARGUMENT BY DEFENSE COUNSEL TO SUPPRESS EVIDENCE.

[R-52, Line 9]

MR. THORNBURGH: No, but I would like to approach the bench when this witness is excused.

At this time, your Honor, the defense wishes to move to suppress, and have the Court instruct the jury that all the testimony of this witness will be stricken and disregarded concerning anything after the time that the man was placed under arrest until the time he was advised

of his legal rights, which included the movie and the physical tests, Breathalyzer, and the questionnaire.

* * *

[R-53, Line 21]

MR. THORNBURGH: In view of the Miranda decision I would like to first state that I feel that before the Miranda decision on the question of voluntariness, that perhaps a thing such as the Breathalyzer or anything he consented to would be admissible and [R-54] apparently —from what I know, from what he has told me and from what the Officer said, the Breathalyzer, if otherwise admissible by reason of being supported by expert testimony might well be admissible, but as to the movies and the physical tests, I don't feel that he consented to those.

Now since the Miranda decision and this is the key thing, Judge, as I understand the Miranda decision, as soon as a person is placed under arrest and it seems to be pretty clear cut in this case as to when he was placed under arrest, and what he was charged with, you no longer have an investigatory case, you have an accusatory, and at that point this man, before he either testified to anything, gave any written or oral statement or participated in any way in any types of physical tests, particularly when they were given to him after he was already charged and merely as evidence to bolster this case, I think they are clearly inadmissible, and unless he has been first advised of his constitutional rights, first to an attorney and second that anything done and said may be used against him, and by the city's own admission this was not done in this case. And I feel that since the Miranda decision, the movies or anything said or done after the scene where he was placed under arrest at South and Downing Street was done in violation of his constitutional rights and is inadmissible.

* * *

[R-55, Line 5]

MR. THORNBURGH: Well, certainly to due process of law, to self-incrimination. In other words, he was under arrest. He was clearly under custody and as I understand the Miranda and the following decisions, anything that he does, says or is asked to do or perform while in custody, after it has once become accusatory, or here, under arrest, is in violation of his rights unless he's first been advised as to his rights to counsel and that anything he does or says may be used against him. I think it is self-incrimination, right to counsel, due process of law.

* * *

[R-58, Line 2]

MR. THORNBURGH: I presume from this point on, Judge, as each officer is called I can merely renew this motion as to them at the bench, have a similar ruling. I know of no reason why it would be any different with the one exception, and that would be I think the hurdle we just had earlier on the interpretation of the Breathalyzer reading.

* * *

Throughout the trial the accused's objections were overruled. Upon appeal, denial of these federal rights were the basis of the appeal from the outset. The Court of Appeals found the constitutional questions to be raised promptly, in language (see Appendix I) as follows:

> "The defendant made a timely and continuing motion to suppress the evidence presented by prosecution on the ground that the procedure adopted by the police was contrary to the principles enunciated in Miranda vs. Arizona, 384 U.S. 436."

G. ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

So that there is no dispute about the facts and the applicable issues in the case, we first set forth pertinent excerpts from the testimony of the two police officers who testified, as follows:

EXCERPTS FROM THE RECORD OF THE CROSS-EXAMINATION OF OFFICER TAYLOR.

[R-24]

Q Then after the movies and after the physical tests and after the Breathalyzer, then you set down or one of the officers set down and asked questions and put down check marks, is that correct?

A No, sir during —

Q Go on. During what?

A While Officer DeBrosse was getting the Breathalyzer ready, we sat down and I was filling it out during that time.

Q After the movies, though?

A The movies had been taken during these tests.

Q Now you said that you advised this man of his rights. When did you first advise him of his rights?

A In the office there.

Q And what you say is advising him of his rights is that he need not take the Breathalyzer test?

A Yes, sir.

Q That is the only rights you advised him of?

A Yes, sir, I advised him —

Q That was some fifteen minutes or so after you had placed him under arrest?

[R-25]

A Possibly that long.

Q When you placed him under arrest, did you charge him with DWI?

A Yes, sir I did.

Q When you placed him under arrest for DWI out there on Downing Street, did you at that time advise him that he had the right to an attorney?

A No, sir, I did not.

Q Did you at any time that evening advise him of that right?

A Yes, I did.

Q When?

A The same time I advised him as to the test and so forth.

Q That was after the movies?

A It was during the time they were being taken, yes.

Q Do you mean while they were taking movies of him he was being put through certain physical tests?

A Yes.

Q It was during the course of his picking up coins or touching his nose that you told him he had the right to an attorney ?

A No, that was after that.

Q It was after this that you advised him of his right to an attorney?

[R-26]

A Yes, sir.

Q In other words, you had already taken movies, you had already taken physical tests and after you had done all that which is some fifteen minutes after you had placed him under arrest, for the first time you advised him of his right to an attorney?

A Yes, sir.

Q That was after you had placed him under arrest

A He kept saying he was so drunk he didn't need anything.

Q I realize that. You didn't advise him of the rights?

A No, sir, I did not.

Q And you had the camera set up and this is a very brightly lighted room—as I understand it, you have got a whole string of neon lights across there?

A They are set in rows, yes.

Q For optimum pictures you have got to have much more light than you have in a normally lighted room?

A Yes, sir.

Q Of course, it was dark outside?

A Yes.

Q And it was dark in your cruiser?

A Yes.

Q And he had been in the dark for a period of probably fifteen minutes from the time he got in his car until you stopped him, put him through tests and got him back to the police station?

A I would say, yes.

Q And you walked in there with him and they began taking pictures?

A Yes.

Q And as they were taking pictures, it was then you [R-39] asked him to perform certain tests?

A Yes.

* * *

[R-41, Line 11]

Q And at the time you were putting this man through the test, there was no question in your mind but what he was under arrest and you intended to charge him with DWI?

A Definitely.

Q And the purpose of giving him these tests was not to

determine whether he was under the influence of alcohol but merely to get evidence to convict him?

* * *

A Yes, sir, that is the way of getting evidence. [R-45, Line 6]

Q And what other test did you have him perform?

A The test of the coin, and I got handwriting—he wrote his name and address down for me.

Q What were those coin tests?

A You put a series of coins—they can be any number, usually four or six. I put down four, and asked him to pick them up.

Q Where did you put the coins?

A On the floor.

Q Right down there?

A Yes, sir.

Q And what did you ask him to do?

A Just to bend down, pick one up, place it on the desk with his head up, and bend down and get another one and place them in a straight line.

Q On the desk?

A On the desk.

Q So each time he came down, he had to come up with one?

A Yes, sir.

Q And he'd have to raise up to put it on the desk and [R-46] then he'd have to bend down like that and pick up one and bring it back to the desk and then go down again?

A Yes, sir.

Q Why did you do that?

A Like I said, we've had a little schooling and it all goes back to the inner ear balance. A way of checking the balance.

Q In other words, the purpose was not to have this man identify whether it was heads or tails on the coins, was it?

A It is, but I didn't tell him that.

Q Well, if you wanted a person to identify whether it was heads or tails, couldn't you just put them on the table and ask him to pick out certain ones and move them over there?

A No, it has to be done on the floor, for him to go down, come up for a check of the balance then.

Q I realize that you do it that way but as far as identification of coins, it would be easier and simpler to just pick them out on the table where the person is sitting or standing?

A If the purpose was to pick out heads or tails, yes.

Q Isn't it the purpose of the tests to get the man's head first elevated and then down at a low level and then get him back and forth like that four or six times?

A Yes.

Q And this is not a normal maneuver for the body to do, [R-47] is it?

A I wouldn't see anything abnormal about it, bending down and picking something up.

Q In other words, have that man do this four or six times quickly like that, while you are watching?

A He does it in his own time. He's not told to do it quickly.

Q But all the time you are taking movies of him?

A Yes, sir.

* * *

[R-48, Line 4]

Q What other tests did you do?

A Well, there is the walking which you went through, the balance, your index finger to your nose.

Q Now that's done with the arm extended?

A Yes, sir.

Q And then they are to take their index finger on one hand and bring it in?

A Touch their nose.

Q Touch their nose, take the other hand and bring it in like that and they're told to touch their nose?

A No, you tell them to take either the left or the right and do it several times, and then do it with the other hand.

Q So there are several attempts with one hand and then with the other?

A Yes.

Q Do you have them with their eyes open or closed?

A The eyes are closed.

* * *

[R-50, Line 5]

Q Then what did you do?

A Well, after that was the coins, and then I believe I just had him to set down and we started on this form.

Q What did you have him sign?

A Just a specimen of handwriting there—it is on the form. Just his name and address.

Q And I guess you had him sign some other things, too?

A No, sir, I did not.

Q That is the only thing you had him sign?

A Yes.

Q Then when was the Breathalyzer given?

A That was during, when I was filling out the back of the questioning of this form, Officer DeBrosse had the machine ready and he went up and blew for the Officer, and I waited on him.

Q And it was at this time for the first time that you told him he didn't have to do this?

A No, sir, I told him when he was being booked.

Q Then after all these were done it was then that he was advised that he had the right to an attorney?

A As he was being booked, yes.

[R-51]

Q After all these tests?

A Yes, sir.

Q The questions and so forth?

A Yes.

EXCERPTS FROM THE RECORD OF THE CROSS-EXAMINATION OF OFFICER DEBROSSE

[R-66, Line 25]

Q Did you at any time while you were there hear any [R-67] officer advise him as to his rights to an attorney?

A Yes, he was told he could call an attorney.

Q When?

A The procedure is the time they are being booked.

Q You tell them as they are being booked, after they have gone through all these tests?

A Yes, they have, usually gone through that procedure, yes.

Q So the first time this man was ever advised as to his rights to an attorney was after you had taken movies, after you put him through physical tests, after you put him through the Breathalyzer and after you filled out the questionnaire?

A This has been the procedure.

Q And he was already under arrest and charged with DWI before you performed any of these tests?

A Yes, I suppose he was.

Q So the sole purpose for performing these tests is to try to bolster your case against him?

A That's the procedure.

Q He was already charged with DWI and was under arrest?

A Yes.

Q And then you, after doing those things, then you went through all these tests and then later one of the officers advised him he had a right to call a lawyer?

A Yes.

* * *

The foregoing testimony makes it clear that the accused was not given the constitutional safeguards required by *Miranda*. One Ohio Court of Appeals says it is not necessary, *Columbus v. Hayes*, 9 Ohio App. 2d 38, confining their pronouncement to the following:

> "The punishment which may be imposed for the offense of operating a vehicle while under the influence of alcohol is not, at present, sufficient to bring that offense within the constitutional limitations of custodial interrogation under Miranda vs. Arizona (1966), 384 U.S. 436."

A second Ohio Court of Appeals holds that *Miranda* does apply to such cases, *Piqua* v. *Hinger*, 13 Ohio App. 2d 108, and supplies reasoning as follows:

> "Unfortunately, the opinion in the Hayes Case states no reasons for its conclusion, and we have encountered some difficulty in recognizing why constitutional rights are any less sacred in misdemeanor cases than in felony cases.
>
> "The distinction between misdemeanors and felonies is found in the penalty provisions of the criminal law, and this distinction, which is based entirely upon

the place of possible confinement, has little or nothing to do with the actual trial of a criminal case. How then could this distinction affect the basic question of fairness which is an inherent quality of every constitutional safeguard?

"The Constitution is, of course, aloft from administrative inconvenience, and we perceive no other valid reason for lowering its protective shield during the trial of misdemeanor cases. The onerous prospect of confinement in the county jail rather than the state penitentiary is hardly an adequate substitute for a fair trial, and, as a practical matter, it is well known that the actual punishment for many felonies is less harsh and severe than the penalties which may be inflicted in some misdemeanor cases.

"We have no sympathy for the defendant in this case. Traffic problems being as they are, he has been charged with a very serious crime. But the defendant is not a criminal in the usual sense. His occupation is that of a paper hanger, and he should be entitled, at least, to the same constitutional protection afforded daily to hardened criminals."

With conflicting Court of Appeals decisions, judges, lawyers, law enforcement officers and much of the public, look to the Supreme Court of Ohio to resolve the issue. The best summary of the dilemma in which we now find ourselves in Ohio is composed of the opening and closing sentences of the opinion of the Supreme Court of Ohio, as follows:

First Sentence:

"The question raised in this case is whether the ruling in Miranda is applicable in misdemeanor cases."

Closing Sentence:

"Accordingly, we do not reach the question of the

applicability of Miranda to misdemeanor cases, and express no opinion thereon."

To eliminate doubt and confusion, we feel this important issue should be resolved — for the benefit of the many interested people throughout the country. It becomes even more critical for uniform law enforcement when the court of last resort of one of the most populous states refuses to pass on it.

While the foregoing is the issue of most universal interest, the more critical one to this petitioner is the clearly erroneous application of the *Schmerber case, Schmerber* v. *California,* 384 U.S. 757, to the facts in this case. The *Schmerber case,* if its full import is evaluated, is authority for upholding the reversal of the conviction in this case. The majority opinion in the *Schmerber case* includes an important and significant qualification, as follows:

> "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communication' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.
>
> "Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence', for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to

evoke the spirit and history of the Fifth Amendment.

* * *

"In the present case, however, no such problem of application is present. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone.

"Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissable on privilege grounds."

The testimony upon trial of this case, excerpted and quoted hereinabove, is replete with "physical evidence" extracted from the defendant in such a way as to make them "essentially testimonial". This would include the taking of movies upon entering the police station and filming him while they had him perform certain physical tests, such as walking a line, bending over and picking up coins, and touching his nose. In addition, while completing a form for later use at trial they asked him certain questions to test his state of mind. Furthermore, they obtained a specimen of his handwriting. These things were clearly "some communicative act or writing" falling within the qualification of the *Schmerber case* majority opinion.

With basic and academic reasoning, and with the use of "fundamental fairness", if the Supreme Court of Ohio did not wish to pass on the applicability of *Miranda* to misdemeanors, we believe it should agree that the facts in this case make it clearly distinguishable from the blood test of *Schmerber*.

In this case we have many of the "communicative acts" contemplated by the qualifications of the opinion in *Schmerber*. These include the filming of the accused while he is performing certain unnatural physical contortions, the securing of a specimen of his handwriting, obtaining oral answers ("utterances") to questions designed to test his reflexes and his orientation, and the blowing of his alveolar air into a machine.

We urge that had the Supreme Court of Ohio fully considered, and correctly understood, the reasoning of the *Schmerber case,* the inevitable conclusion would be that the foregoing tests elicited "responses which are essentially testimonial."

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued by this court, directed to the Supreme Court of Ohio, to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed by this court.

Respectfully Submitted,

EARL R. HINGER, Petitioner
By: FAUST, HARRELSON & THORNBURGH

By: .....
William H. Thornburgh
Counsel for Petitioner
12 S. Cherry St., Troy, Ohio

RICHARD K. WILSON
Attorney for Respondent
City Building, Piqua, Ohio

APPENDIX I

COURT OF APPEALS

CITY OF PIQUA, APPELLEE, *v.* HINGER, APPELLANT.

[Cite as Piqua v. Hinger, 13 Ohio App. 2d 108.]

Criminal procedure—Evidence—Results of Breathalyzer test admissible, when—In-custody interrogation—Right to counsel—Misdemeanor cases—Operating vehicle while under influence of alcohol.

1. Before the results of a Breathalyzer test given an accused are admissible in evidence against him, it is incumbent on the prosecution to explain the significance of the percentage of alcohol found in the blood and how the instrument functioned to arrive at that percentage.

2. The principles enunciated in *Miranda* v. *Arizona,* 384 U. S. 436, delineating procedures to safeguard the Fifth Amendment privilege against self-incrimination during in-custody interrogation, are applicable where the accused is charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor.

(No. 664—Decided December 29, 1967.)

APPEAL: Court of Appeals for Miami County.

Mr. Richard K. Wilson, director of law, for appellee.

Messrs. Faust, Harrelson & Thornburgh, for appellant.

KERNS, J. The defendant, appellant herein, Earl R. Hinger, was tried and found guilty by a jury of operating a motor vehicle while under the influence of intoxicating liquor, contrary to and in violation of an ordinance of the city of Piqua.

From the judgment and sentence entered upon the verdict, Hinger has appealed to this court on questions of law.

The first of two assignments of error challenges the admissibility of evidence pertaining to the results of a Breathalyzer test administered to the defendant.

A police officer of the city of Piqua testified over objection that the defendant consented to a Breathalyzer test and that the results of the test revealed alcoholic blood content of .16 per cent. Thereafter, a record slip showing the results was admitted into evidence.

The officer who administered the Breathalyzer test had considerable training and experience in the operation of the machine, but candidly admitted that he was not qualified to scientifically interpret the results. In fact, he likened his relationship to the machine to his relationship to an automobile stating that he was familiar with the operation, but could not explain the "whys and wherefores" that produced the result.

In the civil case of *Parton* v. *Weilnau, Admx.*, 169 Ohio St. 145, the Supreme Court of Ohio, at page 151, made the following observation:

> "* * * Certainly, without some definite expert testimony to explain the significance of the percentage of alcohol found in decedent's blood, the evidence as to that percentage does not tend to prove decedent was under the influence of alcohol. At the present time, the scientific foundation for such a test for sobriety is not so well established and known that a court can take judicial notice as to its significance. Therefore, a jury, without the guidance of expert testimony, should not be permitted to speculate as to its significance. * * *"

This observation of the Supreme Court was consistent with the holding in *State* v. *Minnix*, 101 Ohio App. 33, where the syllabus provides as follows:

"1. Testimony upon the results of a test made on an alcometer is in the class of expert testimony and, in order to be competent, the witness must be skilled, learned or experienced in the mechanics and use of such machine, so as to qualify as an expert witness.

"2. A captain in a police department who admits he knows nothing about an alcometer is not qualified to give expert testimony upon the result of a test made on such machine."

Although the *Parton case* was decided more than eight years ago, the Supreme Court has shown no inclination to dispense with the requirement that some scientific interpretation or explanation must accompany the results of sobriety tests. On the contrary, in the comparatively recent case of *Mentor* v. *Giordano,* 9 Ohio St. 2d 140, that court implied that some knowledge of the workings of a Breathalyzer is necessary before the results of the test are admissible against the accused. Therein, at page 146, the court said:

"* * * There is no evidence that the Breathalyzer at the police station was in proper working order or that its manipulator was qualified, other than his own bare declaration to that effect. See *State* v. *Baker,* 56 Wash. 2d 846, 355 P. 2d 806, and *Pruitt* v. *State* (Tenn.), 393 S. W. 2d 747.

"Nor was there any evidence to explain what the '.18 per cent' reading of the Breathalyzer indicated. Under the cases last cited, the evidence relating to the Breathalyzer test was incompetent and should not have been considered."

In the absence of any expert testimony to explain the significance of the percentage of alcohol found in the defendant's blood or how the instrument functioned to arrive at that percentage, we are of the opinion that the trial

court should not have admitted the results of the test into evidence against the defendant—but in view of all the evidence presented in this case it is doubtful that the admission of the test results constituted *prejudicial* error. See *State* v. *Titak,* 75 Ohio Law Abs. 430. Hence, we must meet the second assignment of error.

For most intents and purposes, this is a typical "drunken driving" case except perhaps for the fact that the defendant herein admits the consumption of something more than the proverbial "two beers."

However, a serious constitutional question has been raised. In addition to the Breathalyzer test which was given to the defendant with his consent, he was also put through certain physical tests, and, unbeknown to him, movies were filmed of his actions at the police station. The subject was also asked questions for the purpose of completing a police questionnaire.

A brief reference to the actual testimony presented by the arresting officer probably best illustrates the nature of the question presented:

> "Q. Did you at any time while you were there hear any officer advise him as to his rights to an attorney? A. Yes, he was told he could call an attorney.
>
> "Q. When? A. The procedure is the time they are being booked.
>
> "Q. You tell them as they are being booked, after they have gone through all these tests? A. Yes, they have, usually gone through that procedure, yes.
>
> "Q. So the first time this man was ever advised as to his rights to an attorney was after you had taken movies, after you put him through physical tests, after you put him through the Breathalyzer and after you filled out the questionnaire? A. This has been the procedure.
>
> "Q. And he was already under arrest and charged with DWI before you performed any of these tests? A. Yes, I suppose he was.

"Q. So the sole purpose for performing these tests is to try to bolster your case against him? A. That's the procedure.

"Q. He was already charged with DWI and was under arrest? A. Yes.

"Q. And then you, after doing those things, then you went through all these tests and then later one of the officers advised him he had a right to call a lawyer? A. Yes."

The defendant made a timely and continuing motion to suppress the evidence presented by the prosecution on the ground that the procedure adopted by the police was contrary to the principles enunciated in *Miranda* v. *Arizona,* 384 U. S. 436.

At the trial, the prosecution argued that the *Miranda case* does not apply to misdemeanor cases and cited the case of *Columbus* v. *Hayes,* 9 Ohio App. 2d 38, which provides as follows in the first paragraph of the syllabus:

"The punishment which may be imposed for the offense of operating a vehicle while under the influence of alcohol is not, at present, sufficient to bring that offense within the constitutional limitations on custodial interrogation under *Miranda* v. *Arizona* (1966), 384 U. S. 436."

The trial court overruled the motion to suppress upon the authority of that case.

Unfortunately, the opinion in the *Hayes case* states no reasons for its conclusion, and we have encountered some difficulty in recognizing why constitutional rights are any less sacred in misdemeanor cases than in felony cases.

The distinction between misdemeanors and felonies is found in the penalty provisions of the criminal law, and this distinction, which is based entirely upon the place of possible confinement, has little or nothing to do with the actual trial of a criminal case. How then could this

distinction affect the basic question of fairness which is an inherent quality of every constitutional safeguard?

The Constitution is, of course, aloft from administrative inconvenience, and we perceive no other valid reason for lowering its protective shield during the trial of misdemeanor cases. The onerous prospect of confinement in the county jail rather than the state penitentiary is hardly an adequate substitute for a fair trial, and, as a practical matter, it is well known that the actual punishment for many felonies is less harsh and severe than the penalties which may be inflicted in some misdemeanor cases.

We have no sympathy for the defendant in this case. Traffic problems being as they are, he has been charged with a very serious crime. But the defendant is not a criminal in the usual sense. His occupation is that of a paper hanger, and he should be entitled, at least, to the same constitutional protection afforded daily to hardened criminals.

Accordingly, we are unable to agree with the conclusion reached by the Court of Appeals for Franklin County in the *Hayes case*. In our opinion, the motion to suppress should have been sustained upon the authority of the *Miranda case*.

The judgment will, therefore, be reversed and the defendant discharged.

Judgment reversed.

CRAWFORD, P. J., and SHERER, J., concur.

APPENDIX II

CITY OF PIQUA, APPELLANT, *v.* HINGER, APPELLEE.

[Cite as Piqua v. Hinger, 15 Ohio St. 2d 110.]

Criminal procedure—Evidence—Operating motor vehicle while intoxicated—Physical tests—Motion pictures of such tests—Admissibility—Self-incrimination—Failure to advise of constitutional rights.

1. Physical tests, whereby a person accused of operating a motor vehicle while under the influence of intoxicating liquor is required to write his name and address, to pick up coins placed on the floor, to close his eyes and touch his hand to his nose, and to submit to a Breathalyzer test, and motion picture films made thereof, are real or physical evidence and not such communication or testimony of the accused as is protected by the constitutional privilege against self-incrimination.
2. Testimony regarding such tests, and the films thereof, are not subject to exclusion by reason of the failure to advise the accused of his constitutional rights as required by *Miranda* v. *Arizona,* 384 U. S. 346, and are admissible in evidence irrespective of whether such advice is given. (*Schmerber* v. *California,* 384 U. S. 757.)

(No. 68-110—Decided July 3, 1968.)

CERTIFIED by the Court of Appeals for Miami County.

Defendant was arrested February 1, 1967, and subsequently charged with operating a motor vehicle while under the influence of intoxicating liquor, a misdemeanor. He was taken to a police station where he was questioned, asked to write his name and address, asked to pick up coins placed on the floor, asked to close his eyes and touch

his hand to his nose, and asked to take a Breathalyzer test. He willingly complied with these requests and participated in this series of physical tests. Thereafter, he was advised of his constitutional rights. Unknown to him at the time, motion picture films were made of him while the physical tests were being conducted.

At his trial before a jury in Piqua Municipal Court, these films were admitted into evidence and exhibited to the jury, over the objection of counsel for defendant that they were obtained in violation of defendant's constitutional rights under *Miranda* v. *Arizona,* 384 U. S. 436. The jury returned a verdict of guilty and a judgment of conviction was entered thereon.

Upon appeal, the Court of Appeals for Miami County reversed the judgment of conviction on the ground that evidence of the physical tests performed, and the films thereof, should have been suppressed on the authority of *Miranda, supra.* The court found that its judgment was in conflict with the judgment of the Court of Appeals for Franklin County in *Columbus* v. *Hayes,* 9 Ohio App. 2d 38, and certified the record to this court for review and final determination.

Mr. R. K. Wilson, director of law, for appellant.

Messrs. Faust, Harrelson & Thornburgh and *Mr. William H. Thornburgh,* for appellee.

HERBERT, J. The question raised in this case is whether the ruling in *Miranda* is applicable in misdemeanor cases.

We have examined the record in this case and find that *Schmerber* v. *California,* 384 U. S. 757, is applicable and dispositive of the issue of admissibility of the questioned evidence.

At the outset, it should be noted that no material objection was made to the questions that defendant was asked prior to being advised of his constitutional rights. The

record is clear that the questions asked during the filming of the physical tests were solely for the purpose of getting defendant to speak and participate in the tests, and not for the substance of his answers. The statements of defendant which were reported at the trial in the testimony of the police officers, two of whom were personally acquainted with the defendant, were voluntary and unsolicited, and clearly not the product of custodial interrogation in the *Miranda* sense. See *State* v. *Perry*, 14 Ohio St. 2d 256, Thus, the only question presented on the record is whether evidence of the physical tests conducted, and the film thereof, obtained prior to the time defendant was advised of his rights, is constitutionally admissible.

In *Schmerber* v. *California, supra,* decided in the same term, but after *Miranda,* the United States Supreme Court held that admission into evidence of the results of a blood-alcohol test made on a blood sample withdrawn from a defendant over his objection, and his refusal to submit to such test, on advice of counsel, did not violate his constitutional rights. After considering its decision in *Miranda,* the court, in *Schmerber,* said, at pages 764 and 765:

> "* * * both federal and state courts have usually held that it [the privilege against self-incrimination] offers no protection against compulsion to submit to fingerprinting, *photographing,* or measurements, to *write or speak for identification,* to appear in court, to stand, to *assume a stance,* to walk, or to *make a particular gesture.* The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.
>
> "* * *
>
> "* * * Since the blood test evidence, although an

incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." (Emphasis added.)

The court, in *Schmerber,* upheld the blood-alcohol test although it was claimed that the admission of such evidence was a denial of due process and was the product of an unlawful search and seizure.

The evidence introduced in the trial of the instant case, in respect to the physical tests made and filmed, did not constitute matter communicated by the accused from his knowledge of the offense. On the contrary, it was real or physical evidence of the kind designated in *Schmerber* as unprotected by the Constitution. Such evidence is constitutionally admissible, even if compelled, and irrespective of whether the warnings required by *Miranda* are given. Accordingly, we do not reach the question of the applicability of *Miranda* to misdemeanor cases, and express no opinion thereon.

For the reasons stated, the judgment of the Court of Appeals is reversed, and the judgment of conviction entered by the Municipal Court is affirmed.

Judgment reversed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, SCHNEIDER and BROWN, JJ., concur.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 1 1968
JOHN F. DAVIS, CLERK

No. 595

In The

Supreme Court of the United States

October Term, 1968

EARL R. HINGER,

Petitioner,

vs.

CITY OF PIQUA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE COURT

RICHARD K. WILSON
Director of Law
311 North Wayne St.
Piqua, Ohio
Attorney for Respondent

WILLIAM H. THORNBURGH
Faust, Harrelson & Thornburgh
12 South Cherry St.
Troy, Ohio
Attorney for Petitioner

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

TABLE OF CONTENTS

	Page
Statement of the Case	1
Questions of law presented	
1. Was the Admission of Evidence of Physical Tests and Moving Pictures of such tests and the Admission of Evidence of a Blood Alcohol Test a Violation of Petitioner's Constitutional Rights?	2
2. Does the Miranda Doctrine apply to Misdemeanors or Minor Criminal Offenses?	2

CITATIONS

Cases:

Columbus v. Hayes, 9 Ohio App.(2d) 38	3
Columbus v. Hayes, 40 Ohio Bar 29	3
Columbus v. Hayes, 88 Supreme Court Reporter 296	4
Miranda v. Arizona, 384 US 436	2, 3, 4
Schmerber v. California, 384 US 757	2

Statutes:

Sections 1.05 and 1.06, Ohio Revised Code	3

had consumed alcoholic beverages; if he was taking medicine; if he had been injured, etc.; and similar type questions. He was given a breathalizer test and subsequently booked. At about this time the police officer advised the petitioner as required by *Miranda* in felony cases. Later in February, 1968, a jury found the petitioner guilty. The subsequent history of the case appears in petitioner's petition.

LAW AND ARGUMENT

1. Was the Admission of Evidence of Physical Tests and Moving Pictures of such tests and the Admission of Evidence of a Blood Alcohol Test a Violation of Petitioner's Constitutional Rights?

As pointed out in *Schmerber* v. *California,* 384 US 757, the physical tests and movies thereof, as described in the petition, were neither testimony nor evidence related to some communicative act or writing by petitioner and therefore not within the purvue of *Miranda* v. *Arizona,* 384 US 436.

Since there is no real issue at law with respect to such physical tests, blood alcohol test, and movies, respondent respectfully contends that the petition for writ of certiorari be denied as to this law question.

2. Does the Miranda Doctrine apply to Misdemeanors or Minor Criminal Offenses?

The respondent has been unable to find any decisions of this Court either applying or not applying the *Miranda* decision to minor cases. In the case at bar, the maximum fine was $500.00 and the maximum jail term was six months. The ordinance contains the same provisions as the Ohio statute to the effect that the first three days of the jail sentence cannot be suspended. In Ohio the distinc-

tion between a felony and a misdemeanor is in the possible penalty. Section 1.05 and 1.06 of the Revised Code of Ohio are as follows;

> "1.05 Definition of 'imprisoned.'
>
> As used in the Revised Code, unless the context otherwise requires, 'imprisoned' means imprisoned in the county jail if the maximum term prescribed for the offense is one year or less, and imprisoned in the penitentiary if the maximum term prescribed for the offense is longer than one year."

> "1.06 Definition of felonies, misdemeanors, and minor offenses.
>
> Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. As used in the Revised Code 'minor offense' is synonymous with misdemeanor."

In view of the above quoted sections, there is no question but that Ohio considers the offense in question to be a minor offense.

In respondent's view, the real and only question at issue is whether or not *Miranda* applies to utterances in minor offenses.

The Court of Appeals of Franklin County, Ohio, in *Columbus* v. *Hayes*, 9 Ohio App. (2d) 38, said that it did not. In the same cause the Ohio Supreme Court in Case No. 40794 refused to review the case, 40 Ohio Bar 29; and this Court denied a petition for a writ of certiorari on November 6, 1967, with only Justice Fortas dissenting. 88 Supreme Court Reporter 296.

In respondent's view, *Miranda* does not presently apply to minor offenses; however, since this Court has not affirmatively taken a position on this question, there is con-

siderable confusion as to the application of *Miranda* in minor offenses.

Respondent therefore joins the petitioner in requesting the issuance of a writ of certiorari on the question of the application of *Miranda* to utterances in minor offenses.

Respectfully Submitted,

RICHARD K. WILSON
Attorney for Respondent

LIBRARY
PREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
APR 7 1969
JOHN F. DAVIS, CLERK

NO. 595

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

EARL R. HINGER,

Petitioner,

vs.

CITY OF PIQUA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

WILLIAM H. THORNBURGH
Faust, Harrelson & Thornburgh
Attorneys at Law
12 S. Cherry St.,
Troy, Ohio

Attorney for Petitioner

RICHARD K. WILSON
Law Director, City of Piqua
City Building
Piqua, Ohio

Attorney for Respondent

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

NO. 595

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

EARL R. HINGER,

Petitioner,

vs.

CITY OF PIQUA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner respectfully moves for leave to file a petition for rehearing of the order denying the petition for writ of certiorari, and herewith files such petition, and requests that such leave be granted even though it has been more than twenty-five days since the decision of this court denying the petition for writ of certiorari.

The basis of this present motion is that it is still within term, and both counsel in this case misconstrued Rule 58 regarding rehearings. In the printed rules of this court the first two paragraphs of Rule 58 read as follows:

"1. A petition for re-hearing of judgments or de cisions other than those denying or granting certiorari may be filed with the Clerk in term time or in vaca tion, within 25 days after judgment or decision, etc.

"2. A petition for rehearing of orders on petition for writs of certiorari may be filed with the clerk in term time or vacation, etc."

Counsel for petitioner made no effort to have the time enlarged by this court because he construed the rule to mean that in the absence of an extension it was twenty five days on all matters other than petitions for writs of certiorari, and that with the latter it could be done at anytime during term.

Respectfully submitted,

FAUST, HARRELSON & THORNBURGH

William H. Thornburgh
Attorney for Petitioner